



June 8, 1999

Mr. Leonard Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4009
Huntsville, Texas 77342-4004

OR99-1595

Dear Mr. Peck:

You ask this office to reconsider our ruling in Open Records Letter No. 98-3175 (1998). Your request for reconsideration was assigned ID# 124079.

The Texas Department of Criminal Justice (the "department") received a request for, among other things, the winning proposals for "[t]he Request for Offer (RFO) for Phase I, Phase II(a), and Phase II(b)" and the winning proposal for "IV & V services." In Open Records Letter No. 98-3175 (1998), this office concluded in part that the department could not withhold certain information relating to Logicon RDA ("Logicon") because Logicon did not sufficiently explain why its proposal was protected under section 552.110 of the Government Code. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). On behalf of Logicon, you ask this office to consider Logicon's additional arguments under section 552.110.

Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Logicon has made arguments against disclosure under both prongs of section 552.110.

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the

standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.-Austin May 20, 1999, no pet. h.). Because neither the department nor Logicon has cited to a statute or judicial decision that makes the submitted information privileged or confidential, you may not withhold the submitted information under the commercial or financial information prong of section 552.110.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

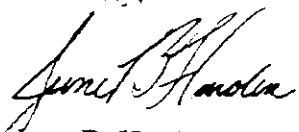
After a review of the arguments and the submitted information, we agree that portions of Logicon's proposal are excepted from disclosure as trade secrets. We note, however, that

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

pages 24-25 and Attachments 1-5 consist of historical information about Logicon and information about its qualifications. Logicon has not demonstrated that this information is a trade secret. See Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). Thus, with the exception of pages 24-25 and Attachments 1-5, the department must withhold Logicon's bid proposal from disclosure under section 552.110. Open Records Letter No. 98-3175 is, therefore, overruled to the extent it conflicts with this conclusion.

If you have questions about this ruling, please contact our office.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 124079

Encl. Submitted documents

cc: Ms. Deanna Hendrix
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